***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

76-7554

# United States Court of Appeals

FOR THE SECOND CIRCUIT

ELSIE M. HAVANICH,

*Plaintiff-Appellant,*

—v.—

SAFECO INSURANCE COMPANY OF AMERICA,

*Defendant-Appellee.*

## APPELLEE'S BRIEF

ARNOLD J. BAI
MARY E. SOMMER
OF
BAI, POLLOCK & DUNNIGAN
*Counsel for Defendant-Appellee*
10 Middle Street
Bridgeport, Connecticut 06604

# INDEX

## Table of Authorities

# United States Court of Appeals

FOR THE SECOND CIRCUIT

ELSIE M. HAVANICH,

*Plaintiff-Appellant,*

—v.—

SAFECO INSURANCE COMPANY OF AMERICA,

*Defendant-Appellee.*

## APPELLEE'S BRIEF

### Statement of the Case

On February 19, 1971, Carol Ann Havanich was fatally injured while riding as a passenger in an automobile operated by one Joseph DeCesare in Franklin, Massachusetts. The DeCesare automobile was at that time covered by liability insurance in the amount of $5,000.00 (the minimum then allowed under the Massachusetts financial responsibility law) which coverage was written through Fireman's Fund Insurance Company. The parents of Carol Ann Havanich had a family automobile liability insurance policy written by the defendant Safeco providing, among other coverages, standard uninsured motorist coverage and medical payments coverage (Exhibit #3).

The Havanich family retained Attorney Sigmund Miller and thereafter on February 24 or 25, 1971, Mr. Miller contacted the Fairfield, Connecticut, office of Safeco and notified one of its claims employees, Mr. Brownie Blazak, of the accident (app. 40a). At the time of this initial dis-

cussion, Mr. Miller states that Mr. Blazak indicated that Safeco would not pay benefits under uninsured motorist coverage based upon information which was then available (app. 42a). At or about the time of this preliminary conversation, Mr. Miller was in possession of the Safeco policy (Exhibit 3) issued to the Havanich family. Under coverage G of this policy (relating to injuries caused by uninsured motorists) the folowing exclusion appears:

> "This policy does not apply under this section . . . (b) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this section shall, without written consent of Safeco, make any settlement with any person or organization who may be legally liable therefor . . ."

Following his preliminary conversation with Mr. Blazak, Mr. Miller then proceeded to pursue a claim for benefits solely under medical payments coverage. Mr. Miller wrote two letters dated March 2, 1971 and March 25, 1971 to Safeco (Exhibits 4 and 9, app. 23a and 27a). In the March 2nd letter (Exhibit 4, app. 23a) Mr. Miller referred only to medical payments benefits. He stated as follows:

> "Although my investigation is incomplete, it is my present understanding that Mr. DeCesare has the minimum assigned risk coverage of $5,000 without medical payment features. As a result, claim will undoubtedly be made under the above policy for the bills incurred as a result of this fatality. These will be sent to you as received."[1]

[1] The reason that Mr. Miller's letter refers to DeCesare's coverage of "$5,000 without medical payment features" was to advise

Attorney Miller's letter of March 25, 1971 (Exhibit 9, app. 27a) again confirmed the limit of Mr. DeCesare's policy and enclosed the funeral bill. This letter ended by stating that "I trust that this will complete the matter of the medical payment of the funeral bill."

The above two letters relating to medical payments coverage constitute the only formal written claims presented by Mr. Miller under the Safeco policy prior to the execution of a release in favor of DeCesare. Both letters were promptly answered by Safeco's claim department. As far as Safeco was concerned, nothing further was requested of it and nothing further was to be done. Having tendered medical payments benefits to the $2,000 policy limit, and not having had any further contact or communication from Mr. Miller, Safeco closed its file on April 7, 1971 (Exhibit 27, app. 35a).

Thereafter on June 25, 1971, without notice of any kind to Safeco, a "friendly suit" was filed against DeCesare in Massachusetts (app. 77a). On July 1, 1971, a general release executed in the amount of $5.000 by the Havanich estate in favor of DeCesare (Exhibit 10, app. 28a, 52a and 76a). The sum of $5,000 was thereupon paid by Fireman's Fund to the Havanich estate.

The first formal request by Mr. Miller to Safeco for uninsured motorist coverage benefits (i.e. the difference between the $5,000 received from Fireman's Fund and the $20,000 Safeco uninsured motorist coverage limit) is con-

---

Safeco that its medical payments coverage was primary. If the policy written by Fireman's Fund for DeCesare had contained a standard medical payments provision, then Fireman's Fund would have had primary medical payments coverage and Safeco's policy would have been excess.

tained in a letter from Mr. Miller *dated July 16, 1971* and received by Safeco on July 19, 1971 (Exhibit 12, app. 30a) at which time the settlement with DeCesare and the execution of the release in his favor were accomplished facts.

Institution of suit against DeCesare, entry of judgment, release of the responsible tortfeasor and payment by Fireman's Fund all occurred without any knowledge or notice to Safeco. At no time had Attorney Miller indicated that in any way that settlement negotiations with DeCesare or a "friendly suit" was in progress. Nor did Mr. Miller prior to execution of the release in favor of DeCesare make any formal written claim for uninsured motorist coverage nor did he even mention or in any way refer to such coverage in his correspondence to Safeco. Nevertheless, he procured the DeCesare settlement with full knowledge that Safeco's policy barred recovery under uninsured motorist coverage after release of the responsible tortfeasor without the written consent of Safeco. Promptly upon learning of the settlement, Safeco disclaimed uninsured motorist coverage based upon the policy exclusion and the plaintiff thereupon commenced this action against Safeco.

The case proceeded to jury trial in the United States District Court for the District of Connecticut at Waterbury before the Honorable Thomas F. Murphy. When the plaintiff rested her case on Friday, October 1, 1976, the defendant moved for directed verdict on the ground that as a matter of law, the release executed in violation of the policy extinguished the liability of the third party and barred recovery under the uninsured motorist provision of Safeco's policy.

Although Judge Murphy stated his intention to reserve further argument until the following Tuesday (October 5, 1976), plaintiff's counsel requested to argue on Friday, October 1, and the court heard him fully (app. 95a-98a). On the following Tuesday, plaintiff's counsel attempted to present additional argument. Having heard both sides, Judge Murphy declined to receive further oral arguments and granted the motion for directed verdict (app. 99a-100a). The court stated the following basis for its decision:

> "There was no dispute that the plaintiff executed a general release in favor of Joseph DeCesare, the operator of the vehicle in which Carol Ann Havanich was a passenger at the time of her death. Consideration was $4,000 [sic] which was paid by Fireman's Fund Insurance Company on behalf of Joseph DeCesare. Such a settlement forecloses the plaintiff and the defendant from any suit each would have against DeCesare and is also in direct violation of the terms of the policy which prohibits settlement without written consent of the defendant, which was not obtained (app. 100a)."

Thereupon, judgment was entered for the defendant by direction of the court and the plaintiff's complaint was dismissed upon its merits (app. 100a).

# ARGUMENT

## I.

**The plaintiff is barred from recovery under uninsured motorist coverage because of her unauthorized settlement and release of the third party tortfeasor (DeCesare).**

### A. *The Unauthorized Settlement and Release Is a Direct Violation of the Policy Contract*

The Safeco policy in question contained a clear and unambiguous exclusion of uninsured motorist coverage in the event of any settlement by the insured made without prior written consent of Safeco. Under the heading "Exclusions" in the uninsured motorists coverage section (Exhibit #3, page 5) it is stated:

> "This policy does not apply under this section: . . . (b) to bodily injury to an insured with respect to which, such insured, his legal representative or any person entitled to payment under this section shall, without written consent of Safeco, make any settlement with any person or organization who may be legally liable therefor . . ."

Decisions in many jurisdictions clearly hold that if the insured has any expectation of recovering uninsured motorist benefits in addition to settling with the uninsured (or underinsured) party, compliance with the provision requiring prior written consent of the uninsured motorist carrier is essential. These cases have held that failure to comply with the provisions requiring the insurer's consent

to a settlement bars any claim under the uninsured motorist coverage.

The rationale underlying this rule is stated in *Cotton States Mutual Insurance Co.* v. *Torrance,* 137 S.E. 2d 551 (C.A. Ga. 1964):

> ". . . the insurer is entitled to contract to protect its rights against the uninsured motorist in the event of payment under the policy and to provide for a forfeiture in the event of violation by the insured."

See *Kirouac* v. *Healey,* 104 N.H. 157, 181 A.2d 634 (1962) and other cases cited therein.

In *Kisling* v. *MFA Mutual Insurance Company,* 399 S.W. 2d 245 (C.A. Mo. 1966), the insurer was placed in a position similar to that of Safeco in this case. The court first made clear its view that such exclusions were valid. It then found that *although the plaintiff's attorney advised the insurer's attorney of his intent to settle* with the uninsured motorist by way of a covenant not to sue and then proceed against the insurer, the plaintiff did not obtain written consent of the insurer in violation of the policy. "Since the carrier was not informed of the proposed settlement sum and had no information concerning the matter other than the attorney's blunt declarations of what he was going to do," judgment entered for the insurer.

Likewise in the case of *Estrada* v. *Indemnity Insurance Company,* 158 Cal. App. 2d 129, 322 P.2d 294 (1958) the court clearly stated the applicable rule as follows:

> "A release sufficient to relieve the uninsured motorist of liability is considered a settlement which operates to

> absolve the insurer of liability under the uninsured motorist endorsement, regardless of the motives prompting execution of the release, or of any reservation of rights contained therein."

In the Havanich case, the settlement and release are a valid and final determination of the parties' rights under the above rule of law.

"The exclusion of coverage occurs when the insured settles with the uninsured motorist without the insurer's consent. The policy does not make it dependent on whether the right of subrogation will eventually produce reimbursement. Violation of these policy conditions forfeited the plaintiff's right to uninsured motorist coverage." *Charest* v. *Union Mutual Co. of Providence,* 313 A.2d 407 (Sup. Ct. —N.H. 1973). See also, *Griffin* v. *Aetna Casualty & Surety Co.,* 189 So. 2d 324 (La. App. 1966); *Kirouac* v. *Healey,* 104 N.H. 157, 160, 181 A.2d 634, 636 (1962). *Dancy* v. *State Farm Mutual Auto Insurance Co.,* 324 F. Supp. 964 (S.D. Ala. 1971); A. Widiss, *A Guide to Uninsured Motorist Coverage* §5.7 at page 168 (1969); *id.,* supp. 1973, at page 122.

In *Griffin* v. *Aetna Casualty & Surety Co., supra,* the court stated, "Since Mrs. Griffin without the written consent of the insurer, has made a settlement with a person who may be liable for physical damages sustained by her we conclude that under the clear and unambiguous provisions of the policy, the uninsured motorist coverage does not apply. *Regardless of the motives which prompted the parties to enter into this compromise agreement,* a substantial sum of money was paid by the Ducotes and accepted by

the plaintiff as a consideration for the release." (Emphasis added.)

Although there is no Connecticut court decision directly in point, there is every reason to believe that Connecticut courts would follow the vast majority of reported decisions which adhere to the rule that unauthorized settlement with the uninsured (or underinsured) party invalidates coverage under the uninsured motorist policy provisions.

**B. *The Unauthorized Settlement and Release Extinguished the Legal Liability of the Third Party Tortfeasor Which Is the Sole Basis for Uninsured Motorist Coverage***

Coverage G of the Safeco policy provides for payment of all sums the insured or his representative shall be *legally entitled to recover* from the uninsured motorist. As used in the policy, "legally entitled to recover" refers to the insured's right to recover from a wrongdoer who could have been found negligent and required to respond in damages. An insured is thus not entitled to recover unless he can prove the legal liability of the wrongdoer. This recovery right is subject to legal defenses which may be raised by the uninsured motorist such as contributory or comparative negligence, statute of limitations, res judicata and release. Because the plaintiff's right to recover under the uninsured motorist endorsement is derivative and conditional, any defense available to the uninsured tortfeasor is also available to the insurer.

One defense to the action by the insured against his insurer for uninsured motorist payments is the expiration of the statute of limitations as against the uninsured tortfeasor. If the applicable statute of limitations has run against the uninsured party, there exists a valid defense

to the action and the insured will be precluded from recovery.

Similarly, execution of a release will also operate to bar legal liability on the part of the uninsured motorist since the effect of a release is to extinguish the legal liability of the uninsured motorists for the injury and bar any further action or claim against him. The affirmative defense of release has been held to entitle the insurer to judgment in actions by insureds for recovery under an uninsured motorist endorsement. *Sears, Sucsy & Co.* v. *Insurance Co. of North America,* 392 F. Supp. 398 (D.C. Ill. 1975). Like the statute of limitations, a release is "a plea in bar sufficient to destroy the plaintiff's action. When established by proof, it defeats and destroys the action altogether." *Brown* v. *Lumberman's Mutual Casualty Company,* 19 N.C. App. 391, 199 S.E. 2d 42 (1973); cert. granted, 284 N.C. 252, 200 S.E. 2d 652 (1973); aff'd 285 N.C. 313, 204 S.E. 2d 829 (1974).

If by compromise and settlement two parties agree to adjust their respective rights and liabilities, the law recognizes such agreements as final and irrevocable. An insured who executes a release is therefore no longer legally entitled to recover against the wrongdoer and the uninsured motorist carrier cannot be liable on the policy. This is true even absent the specific policy exclusion in this case. It is conceivable that an uninsured motorist, having entered into a favorable settlement, could then without fear of judgment testify as to his own negligence toward the insured. The more successful the uninsured is in depicting his own lack of due care, the greater the exposure of the insurer. An insured with high uninsured motorist

coverage limits on his own policy could then settle nominally with the uninsured in return for testimony favorable to recovery under his own policy. In view of both the established legal effect of a release and the above described danger inherent in the very nature of uninsured motorist claims, it is clear that once an insured executes a release, both law and public policy require that the liability of the insurer under the uninsured motorist clause of the policy be extinguished.

### C. *The Initial Telephone Conversation Between the Plaintiff's Attorney and Safeco's Representative Cannot Be Construed to Alter the Policy Provisions*

The plaintiff attempts to excuse her unauthorized settlement and release by relying upon a preliminary telephone conversation between Mr. Miller and a Safeco claims employee on February 24 or 25, 1971, when Mr. Miller was allegedly informed that coverage did not exist under the uninsured motorist provision. At or shortly after that time, however, Mr. Miller had a copy of the policy which indicated the availability of coverage. Moreover, the telephone conversation was Safeco's first notice of claim. Obviously Safeco had no opportunity to investigate and to formulate any final coverage position.

Thereafter, Mr. Miller corresponded with Safeco regarding medical payments coverage. At no time before execution of the release, however, did he or the plaintiff ever make any formal or written demand upon Safeco for payment of uninsured motorist benefits; and the release in favor of DeCesare was executed without Safeco's knowledge and without notice to Safeco.

The plaintiff in her brief appears to place considerable emphasis upon the case of *Calhoun* v. *State Farm Mutual Insurance Co.*, 254 Cal. App. 2d 407, 62 Cal. Rptr. 177, (1967). That case, however, contains several essential distinctions decisive of the issues in the Havanich trial. Not only does *Calhoun* differ from the instant case in that there were numerous specific demands and refusals during extended negotiations, it also contains *the critical element of formal written notice* to the insurer of the intention of the insured to settle with the uninsured motorist. In its decision the *Calhoun* court stressed the element of formal notice to the insurer using italics to emphasize that the insurance carrier had full knowledge of Calhoun's intention to settle. In the present cast, by his own admission, Attorney Miller acted unilaterally and with full awareness of the legal consequences when he settled with DeCesare (app. 50a). The plaintiff cannot now object to the operation of a rule of law, the effect of which was well known at the time the release was executed.

The *Calhoun* case certainly did not abrogate or in any way change the principle that uninsured motorist coverage is inapplicable where an insured consummates an unauthorized settlement with the uninsured or underinsured tortfeasor. The decision in *Calhoun* is limited to the somewhat unique facts of the case itself; it neither extended nor altered existing established law. The *Calhoun* decision, moreover, expressly distinguishes two earlier California cases in which the insurer had no such formal notice of the insured's intention to settle. See *Travelers Indemnity Co.* v. *Kowalski,* 233 Cal. App. 2d 607, 43 Cal. Rptr. 843 (1965) and *Portillo* v. *Farmer's Insurance Exchange,* 238 Cal. App. 2d 58, 62, 47 Cal. Rptr. 450, 453 (1965).

The insured in the *Kowalski* case acted exactly as in the Havanich case. The essential fact in *Kowalski* was that "the insured filed suit and prosecuted his action to judgment *without the knowledge or consent of the appellant*" [insurer] (emphasis added). The court held the insurer not liable for payment of uninsured motorist benefits.

In *Portillo,* also, the holding of the court was that failure to obtain the insurer's written consent to settlement relieved the insurance carrier from any liability under the uninsured motorist coverage provision of its policy.

The general approach to liberal construction of a policy does not vitiate the elementary principle that the judicial function is simply to ascertain the application and effect of the policy in the light of the facts presented. Recognizing this, the court in *Kowalski* stated:

> "While it is true that insurance contracts are commonly given a liberal interpretation in favor of the insured, and that courts are strongly inclined against forfeitures, it is equally true that language used in an insurance contract must be given its plain and ordinary meaning, and when it is unambiguous, it must be given effect . . . We must and do construe the policy as well as the statute according to its unambiguous language, and when this is done, it is clear that because respondent prosecuted his action to judgment against the uninsured motorist without written consent of his insurer, he is denied the insurance protection established by statute and described in his policy." *Travelers Indemnity Co.* v. *Kowalski,* 233 Cal. App. 2d 607, 43 Cal. Rptr. 843 (1965).

The facts of the present case are strikingly similar to those in the *Kowalski* and *Portillo* cases. Safeco had no knowledge of the unauthorized settlement or of the negotiations leading thereto. This information was intentionally withheld from Safeco by Mr. Miller. Preliminary conversations between Mr. Miller and Safeco cannot alter the express terms of the policy. Thus the policy exclusion applies and the court properly held uninsured motorist coverage to be inapplicable.

**D. *No Basis Exists for Any Claim of Waiver or Estoppel***

The plaintiff has made a passing reference in one paragraph of her brief to the so-called waiver and estoppel argument. It is undisputed that the release of DeCesare was without notice to or knowledge of Safeco. No rights were knowingly relinquished by Safeco. For the reasons previously discussed, the waiver and estoppel argument must likewise fail. See *Novella* v. *Hartford Accident and Indemnity Company,* 163 Conn. 552, 561, 316 A.2d 394 (1972) and *Breen* v. *Aetna Casualty and Surety Company,* 153 Conn. 633, 645, 220 A.2d 254 (1966).

## II.

**Plaintiff's attack upon the trial judge is unwarranted and frivolous.**

The plaintiff also claims that the trial judge acted unfairly in refusing to hear argument relative to the motion for directed verdict. This claim is not only unfounded but is also totally irresponsible. Plaintiff's counsel specifically requested an opportunity to be heard in opposition to the directed verdict motion on October 1, 1976, at the conclusion of all evidence. The court stated that "I was going to reserve all of this for Monday morning. But if you want to do it now . . . " (app. 95a). The court thereafter allowed full argument by plaintiff's counsel *at the time which plaintiff's counsel specifically requested.* The court then reserved decision on the motion for directed verdict.

Plaintiff's counsel now complains because the court would not allow him to be heard again on the very same motion when court reconvened the following week. No brief was submitted by plaintiff's counsel at that time. It is evident that the attack upon the trial court is unjustified and unwarranted and merits no serious discussion. See app. 95a to 98a.

## CONCLUSION

**The court properly directed a verdict in favor of the defendant.**

After submission of all of the evidence, there was no dispute that the plaintiff did in fact settle her claim against DeCesare (the underinsured tortfeasor) without the knowledge, consent or authority of Safeco. There was likewise no dispute that such settlement was a direct violation of the insurance policy provisions. The plaintiff's attempted excuse for the policy violation was insufficient as a matter of law. Since no material factual issue existed at the conclusion of trial, the court properly directed a verdict in favor of the defendant.

The defendant submits that the direction of verdict by the trial court was proper; and the defendant, therefore, prays that the judgment of the District Court be affirmed.

Respectfully submitted,

ARNOLD J. BAI
MARY E. SOMMER
OF
BAI, POLLOCK & DUNNIGAN
*Counsel for Defendant-Appellee*
10 Middle Street
Bridgeport, Connecticut 06604

76-7554

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 3rd day of February 1977 , at 9:00 o'clock A M. he served the annexed Appellee's Brief, in RE: Elsie M.Havanich v. Safeco Ins. Co. of America

upon A. Reynolds Gordon

Esq(s)., Attorney(s)

for Plaintiff-Appellant

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/~~their~~) office

855 Main St. Bridgeport, Conn. 06604

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 3rd day of February 1977

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978